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No. 91-____ (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

BARBARA AUSTIN,

Petitioner,

vs.

SANDRA BERRYMAN, PATRICE JOHNSON, JOSEPH HAYES, AND RALPH CANTRELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In attempting to further the economic interests of certain employers by limiting the availability of unemployment compensation, may a state elect a method of saving money that it knows will have a disparate impact on working women, where that choice is based on the stereotypical notion that married women can and should rely on their spouses' income and accordingly do not need unemployment compensation to assist them in finding new work?

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 955 F.2d 223 (4th Cir. 1992). The opinion of the district court (App. 11a-19a) is reported at 768 F. Supp. 188 (W.D. Va. 1991).

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. The decision of the court of appeals denying rehearing (App. 20a) was entered on February 19, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Virginia's Unemployment Compensation Act, Va. Code Ann. § 60.2-618 (Michie 1991), provides in pertinent part:

> § 60.2-618. Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit . . . :
>
> (1) . . . if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter "good cause" shall not include . . . (ii) voluntarily leaving work with an employer to accompany or to join his or her spouse in a new locality.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The United States unemployment compensation system is a joint federal-state scheme enacted during the Great Depression to deal with significant problems of unemployment. By partially replacing lost wages for a fixed period, the system is designed to subsidize the efforts of unemployed workers to find new work and to stabilize the economy. *See California Dept. of Human Resources v. Java*, 402 U.S. 121, 132 (1971). Although the program is a national one, each state is essentially free, within broad federal guidelines, to establish its own set of eligibility criteria. *See id.* at 125.

In the early days of the unemployment compensation program, states did not automatically disqualify claimants who left work for reasons unrelated to their employment. Over time, however, "good cause" for leaving work was increasingly limited to reasons connected with work or the employer, such as plant-closings or lay-offs. *See* United States, National Commission on

Unemployment Compensation, *Unemployment Compensation: Studies and Research* (Wash. D.C.: Government Printing Office, 1980), Vol. 3 (M. Dahm, P. Fineshriber, "Disqualifications For Quits to Meet Family Obligations," at 9). In keeping with this trend, in 1944, Virginia's law was amended to disqualify any claimant who was "unemployed because he left work voluntarily without good cause *involving fault on the part of the employer.*" 1944 Va. Acts c. 181, § 1 at 237 (emphasis added). This meant that employees forced to leave work for purely "personal reasons," such as marital or domestic obligations, or to look for a better job, were not entitled to unemployment coverage. Immediately after the war, however, when there was far less movement of military families, Virginia liberalized its standard by deleting the requirement that workers establish work-related "good cause" for leaving their jobs. 1946 Va. Acts c. 269, § 1 at 438.

In 1979, after a 33-year history of providing benefits to persons who left work because of compelling family obligations, Virginia took a giant step back in time by excluding from the definition of "good cause" the "voluntary leaving of work with an employer to accompany or to join [a] spouse in a new locality." 1979 Va. Acts c. 675, § 1 at 965.[1] While the statute is written in gender-neutral terms, it is undisputed that the amendment overwhelmingly affects women; during the last half of 1989, for example, 86.8 percent of the claimants disqualified under it were women. App. 4a.

The 1979 amendment was prompted by certain public employers of military spouses who had a special interest in preventing their workers from receiving unemployment compensation. Under Virginia law, public employers are given a choice not afforded private employers: they can elect to participate in the unemployment system by paying unemployment compensation taxes on a regular basis -- the same as private employers -- or they can choose to participate on a "reimbursement basis," meaning

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[1] In 1986, the wording of the relocation disqualification was altered slightly to its present form to conform to the language of various other changes made in the law. 1986 Va. Acts c. 480, § 1 at 905.

that they only contribute to the fund for benefits actually paid. Va. Code Ann. § 60.2-507(c) (Michie 1991). Public employers who elected the latter option could save considerable money by denying benefits to employees who "voluntarily" left their job to accompany their spouse. App. 5a.

These employers found a champion in Virginia Senator William E. Fears of Accomack, whose district covered an area heavily populated by military personnel. App. 14a-15a. Senator Fears originally proposed a bill that excluded from coverage only persons who left "public" employment to join or accompany a spouse, many of whom were the wives of military personnel who were reassigned on a regular basis. *Id*; *see also* App. 6a. Not surprisingly, proponents of the bill, including Virginia Employment Commission official John Rusher, were aware of the obvious fact that the burden of the proposed law would fall primarily on women. *See Austin v. Berryman*, 4th Cir. Record No. 91-1750, Appendix of Appellee, at 60.

The proposed bill was then forwarded to the federal government to review, pursuant to 42 U.S.C. § 503. App. 6a. On review, the United States Department of Labor ("DOL") concluded that it was impermissible to distinguish between public and private employment in the manner proposed in Senator Fears' bill. *Id.* DOL also stated, without further elaboration, that it did "not recommend passage of any legislation which would automatically deny benefits to an individual who leaves work to accompany a spouse to a new location . . .." App. 13a. Ultimately, the proposed bill was modified to cover all employees, both public and private, who terminate their employment to accompany a relocated spouse. This modification did not alter the fact that the statute was specifically designed to favor the interests of employers over those of working women and that the primary adverse effects of the amendment have, in fact, fallen on a largely female class. App. 4a.

In 1985, petitioner Barbara Austin left her job as a laundress in Salem, Virginia, to accompany her husband to Castlewood, Virginia, located about 150 miles away. App. 3a. Mr. Austin had decided to relocate to care for his aged mother, who was living

alone and engaging in unsafe behavior, including the discharge of a firearm in her yard. If Mr. Austin had been employed at the time he left to be with his mother, he would have had a substantial claim for unemployment benefits under Virginia's "good cause" provision. However, at the time of their move, which petitioner made to accommodate Mr. Austin and his family, Mrs. Austin was the sole wage earner for their family of four children. App. 3a.

After the move, petitioner applied for unemployment benefits. Although she was otherwise eligible, she was disqualified pursuant to the 1979 amendment. App. 3a. She then filed suit in the United States District Court for the Western District of Virginia under 42 U.S.C. § 1983, alleging that the penalty imposed by the statute infringed on her First Amendment rights to religious and marital privacy and discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. App. 2a. Subject matter jurisdiction was based on 28 U.S.C. § 1343(a)(3).

The district court initially held that the statute was unconstitutional on First Amendment grounds, without reaching petitioner's gender discrimination claim. 670 F. Supp. 672 (W.D. Va. 1987). The *en banc* Fourth Circuit reversed, concluding that petitioner's first two challenges to the statute were without merit. 878 F.2d 786 (*en banc*), *cert. denied*, 493 U.S. 941 (1989). On remand, the district court upheld the statute against the gender discrimination challenge, App. 11a-19a, and the Fourth Circuit affirmed, concluding that the 1979 amendment "is a facially neutral statute that has a legitimate economic purpose." App. 10a.

In so holding, the Fourth Circuit relied on *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), which established the framework for evaluating an equal protection challenge to a facially neutral statute:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is . . . appropriate. The first question is whether the statute is indeed

> neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

Id. at 274 (citations omitted).

With respect to the first prong of the *Feeney* test, the Fourth Circuit found that the Virginia statute is not covertly gender-based because there was an "economic justification" for the 1979 amendment. App. 5a. The Court also noted that Virginia had articulated other "legitimate goals" of the classification: "namely, 'to insure a stable work force, to avoid a tax penalty on employers who maintain positions for employees, and to pay benefits to persons who become unemployed through no preference or fault of their own.'" App. 6a. Without inquiring whether these ostensibly neutral objectives were being carried out in a discriminatory manner, the Court ruled that petitioner "cannot meet the first *Feeney* test . . .." *Id.*

Turning to the second prong of the test, the Fourth Circuit addressed whether the significant adverse effect of the statute upon women "reflects invidious gender-based discrimination." *Id.* While concluding that, under *Feeney*, "disparate impact can provide an indication of a constitutional violation," *id.*, the court again refused to accord any significance to the uncontroverted fact that women comprise the vast majority of the injured class in this case:

> While it is, perhaps, unfortunate that the statute, in one sense, negatively impacts women who relocate with their husbands, it is obvious that the statute, viewed more broadly, also negatively impacts men who relocate with their wives, as well as both spouses whenever a husband or wife relocates to be with a marital partner (in that the total family income will suffer from the inability of husband or wife to receive the unemployment benefits).

App. 7a. Thus, the court discounted the evidence of disparate

impact on women on the grounds that the statute's adverse effects extended to men as well as the entire family unit.

Finally, the Fourth Circuit refused to consider whether Virginia's law is based on stereotypical assumptions about the value of women's labor, stating that, "[w]hile a trial court is to examine a statute to determine whether it is a pretext for gender discrimination, the court is not specifically required to analyze the historical roles of stereotypes in legislative classifications." App. 8a. Based on this view of the court's limited role under *Feeney*, the Fourth Circuit concluded that petitioner had also failed to demonstrate any covert or purposeful discrimination. App. 10a.

REASONS FOR GRANTING THE WRIT

If Virginia had amended its unemployment compensation law to disqualify only women who relocate with their husbands from receiving unemployment benefits, there is no question that such a statute would be struck down as based on an impermissible stereotype about the value of women's labor. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The issue in this case is whether the fact that Virginia's law, unlike the hypothetical statute, employs neutral language to achieve its goal immunizes it from rigorous equal protection scrutiny, notwithstanding its disparate impact on women.

The Fourth Circuit's refusal to recognize Virginia's statute for what it is -- a covertly gender-based statute that impermissibly discriminates against women -- reflects a fundamental distortion of basic principles of equal protection analysis. In direct violation of the teachings of *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), the court failed to draw any inference of discriminatory intent from the fact that Virginia's statute has a disparate impact on an overwhelmingly female class. Instead, the court relied on the fact that Virginia's statute was intended to further the economic interests of certain employers to answer the question of whether the statute was in fact neutral, and refused even to consider whether stereotypical assumptions about women underlie it. In so doing, the Fourth Circuit departed from *Feeney*

and from numerous decisions of this Court that invalidated overtly gender-based statutes on the grounds that they reflected archaic and stereotypical notions about women.

Review is especially important for two reasons. First, Virginia's statute could have adverse ramifications for thousands of women, especially if other states adopt this method of saving money.[2] Second, the Fourth Circuit's decision renders equal protection analysis impotent as applied to facially neutral classifications. This Court has made clear, in *Feeney* and elsewhere, that facially neutral laws are not automatically exempt from rigorous equal protection scrutiny; to the contrary, such laws must be closely examined to determine whether they reflect an invidious discriminatory purpose. Yet it is hard to imagine a facially neutral statute that would *not* survive scrutiny under the Fourth Circuit's eviscerated mode of equal protection analysis, which largely discounts impact as evidence of discriminatory intent and deems legally irrelevant the extent to which a statutory classification reflects impermissible stereotypes. The Fourth Circuit's approach is especially dangerous at a time when legislatures, alert to the fact that facially discriminatory statutes will be subjected to heightened scrutiny, are more likely to employ more subtle forms of gender discrimination, such as that enacted by the Virginia legislature in this case, to achieve otherwise impermissible objectives.

A. THE FOURTH CIRCUIT COMMITTED LEGAL ERROR IN FINDING THAT THE STATUTE IS NOT COVERTLY GENDER-BASED UNDER THE FIRST PRONG OF *FEENEY*.

The Fourth Circuit's first critical error occurred in connection with its application of part one of the *Feeney* test. Under *Feeney*, the initial step in evaluating a claim that a facially neutral

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[2]In this connection, we note that Virginia is only one of four states that unconditionally disqualify unemployment compensation claimants who leave work to relocate with their spouses. *See* Colo. Rev. Stat. § 8-73-108(5)(e)(IV) (1991); Md. Code Ann., Lab. & Employment § 8-1001(d)(2) (1991); Utah Code Ann. § 35-4-5(a) (1991).

statute unconstitutionally discriminates against women is to determine whether the statutory classification is "covertly based upon gender." 442 U.S. at 274. Two factors must be considered in making this determination: first, whether the statute "could be plausibly explained on a neutral ground..."; and second, whether the composition of the injured class "permit[s] the inference that the statute is but a pretext for preferring men over women." 442 U.S. at 275. The Fourth Circuit misapplied *Feeney* with respect to both of these factors.

Feeney involved an equal protection challenge to a statute which provided that all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. 442 U.S. at 259. Because the *Feeney* plaintiffs conceded that the purpose of the law -- to reward veterans for military service -- was neutral and worthy, 422 U.S. at 275, the Court turned to the critical question of impact. According to the statistical evidence, the class being denied compensation was composed of 2,945,000 women and 1,867,000 men (or 61.3 percent women). 442 U.S. at 281 (Stevens, J., concurring). Reflecting on the number of men hurt by the law, the Court ruled that:

> Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. *Too many men are affected by [the statute] to permit the inference that the statute is but a pretext for preferring men over women.*

442 U.S. at 275 (emphasis added). On this basis, the Court concluded that the veteran's preference was not covertly gender-based.

By contrast, in this case, the Fourth Circuit reached its conclusion that Virginia's statutory penalty was not covertly gender-based without even considering the composition of the injured class. Instead, the Court's entire analysis on this point consisted of its finding that the statute's "economic justification"

-- *i.e.*, the financial interests of employers of military spouses -- and the other "neutral" goals offered by the state precluded a finding of covert discrimination. App. 6a.

This holding is directly contrary to *Feeney* in two significant respects. First, the "economic justification" seized upon by the Fourth Circuit as the principal evidence of the statute's neutrality actually supports the opposite conclusion. In *Feeney*, the legislature's choice *in favor* of veterans incidentally placed the class of non-veterans at an economic disadvantage. In this case, by contrast, the legislature directly targeted a particular (overwhelmingly female) group for the *deprivation* of a benefit. The fact that the 1979 amendment was designed to further the economic interests of certain employers does not explain why the legislature was willing to accommodate those interests in this manner, *i.e.*, at the expense of unemployed women, nor does it render Virginia's decision to do so "neutral" in any meaningful sense. Indeed, this type of economic justification could be employed to sustain a wide variety of facially neutral, yet patently discriminatory schemes, such as one reducing only the salaries of nurses at public hospitals to respond to a fiscal crisis. This Court surely did not intend to suggest in *Feeney* that this sort of economic "justification" would alone suffice to exempt a statute from rigorous equal protection scrutiny.

Second, and perhaps most importantly, the Fourth Circuit did not even consider the composition of the injured class before concluding that the statute is not covertly gender-based. This is directly contrary to *Feeney*, where the large number of men in the disadvantaged class was a key factor in this Court's ruling that the veteran's preference statute was not pretextual. 442 U.S. at 275. This error of legal analysis was fundamental, since *Feeney* itself strongly suggests that the result would have been different if the injured class had not contained almost two million men. 442 U.S. at 275 ("[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral"). Indeed, *Feeney*'s conclusion that "too many men" were affected to permit a conclusion of pretext suggests a corollary: if there are "too few" men in the burdened class, the possibility of pretext

must be considered. *Id.* Rather than address this issue, the Fourth Circuit simply disregarded it, in clear violation of *Feeney*.

B. THE FOURTH CIRCUIT ALSO COMMITTED LEGAL ERROR IN EVALUATING THE SIGNIFICANCE OF THE STATUTE'S DISPARATE IMPACT ON WOMEN UNDER THE SECOND PRONG OF *FEENEY*.

The Fourth Circuit also erred in connection with its application of the second prong of *Feeney*, which looks to whether a statute's adverse effect "reflects invidious gender-based discrimination." 442 U.S. at 274. In making this determination, "impact provides an 'important starting point'" for analyzing whether a facially neutral statute reflects invidious gender-based discrimination. *Feeney*, 442 U.S. at 274 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Crawford v. Board of Education*, 458 U.S. 527, 544 (1982). Thus, while "purposeful discrimination is 'the condition that offends the Constitution,'" *Feeney*, 442 U.S. at 274 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)), disparate impact still bears directly on the question of discriminatory purpose:

> Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [this statute], a *strong inference that the adverse effects were desired can reasonably be drawn.*

Feeney, 442 U.S. at 279 n.25 (emphasis added). This "strong inference" of discriminatory intent can only be overcome where "the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate . . . ." *Id.*

In this case, the Fourth Circuit made two crucial errors in evaluating the significance of the statute's disparate impact on women under the second prong of *Feeney*. First, the court applied the wrong legal standard by concluding that disparate impact

merely provides an "*indication* of a constitutional violation," rather than a "strong inference" of discriminatory intent. App. 6a (emphasis added). In so holding, the Fourth Circuit substantially understated the evidentiary value of impact statistics as proof of discriminatory intent, in direct violation of *Feeney* and other decisions of this Court. *See, e.g., Rogers v. Lodge*, 458 U.S. 613 (1982).[3] This error was compounded by the fact that the disparate impact of the Virginia disqualification statute was far more extreme than the impact of the veteran's preference statute in *Feeney*. App. 4a.

Second, the Fourth Circuit refused to recognize even an "indication" of discriminatory intent based on the impact of the statute in this case on the grounds that "the statute, viewed more broadly, *also negatively impacts men* who relocate with their wives, as well as both spouses whenever a husband or wife relocates with a marital partner...." App. 7a (emphasis added). This conclusion, however, is contrary to numerous decisions of this Court invalidating statutes as discriminatory against women even though their economic effects were also felt by male family members.

For example, in *Weinberger*, this Court struck down a provision of the Social Security Act awarding survivors' benefits to widows, but not widowers, who are responsible for dependent children. 420 U.S. at 645. The Court's conclusion -- that the statute impermissibly discriminated against women -- was not altered by the fact that its adverse economic effects actually fell on surviving husbands, rather than on their (deceased) female spouses. *Weinberger* recognized that, economic impacts aside, the statute

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[3]In *Rogers*, which involved a challenge to a facially neutral scheme of electing local commissioners, the Court assigned special significance to the impact of the election scheme on the class of black plaintiffs, concluding that the dramatic impact of the law "bear[s] *heavily* on the issue of purposeful discrimination" and constitutes "*important evidence of purposeful exclusion*." 458 U.S. at 623-24 (emphasis added). Coupled with evidence that "blacks have less opportunity to participate in the political processes and to elect candidates of their own choice," *id.* at 624, the Court held that "the at-large scheme of electing commissioners, 'although racially neutral when adopted, is being *maintained* for invidious purposes.'" *Id.* at 622 (emphasis in original) (citations omitted).

particularly "denigrat[es] . . . the efforts of women" in that they "produc[e] less protection for their families than is produced by the efforts of men." *Id.*

Similarly, in *Frontiero*, the Court invalidated several federal statutes that permitted male members of the armed forces automatically to claim their spouses as "dependents" for purposes of obtaining military benefits, but required female members to prove that their spouses were in fact dependent on them for over one-half of their support. 411 U.S. at 691. As in *Weinberger*, the Court's conclusion that the statutes impermissibly burdened women was not altered by the fact that the adverse economic effects of this scheme were felt by both husband and wife.

Finally, in *Califano*, this Court struck down a statute whereby survivors' benefits were payable to a widow regardless of the degree of her dependency, but to a widower only if he was receiving at least one-half of his support from his deceased wife. 430 U.S. at 208. Again, the Court disregarded the fact that the adverse economic effects of the statute fell on men. Instead, the Court found that, because the statute "results in the efforts of female workers . . . producing less protection for their spouses than is produced by the efforts of women . . . ," the statute "plainly" disadvantages women as compared to similarly situated men. *Id.*

These decisions reveal the fallacy in the Fourth Circuit's conclusion that Virginia's statute does not have any disparate impact on women. Unlike *Feeney*, the 1979 amendment operates to deprive a largely female class of persons of unemployment compensation. Although the economic effects of the statute are certainly shared by family members, it is overwhelmingly women who are *directly* affected by the statute because their efforts "produc[e] less protection for their families than is produced by the efforts of men." *Weinberger*, 420 U.S. at 645. The Fourth Circuit's refusal to recognize the disparate impact of the statute on women is plain legal error, warranting review by this Court.

C. THE FOURTH CIRCUIT ALSO VIOLATED *FEENEY* BY FAILING TO CONSIDER THE ROLE OF STEREOTYPICAL ASSUMPTIONS UNDERLYING THE CHALLENGED STATUTE.

The Fourth Circuit's final, and perhaps most serious, error was its refusal to consider the stereotypical assumptions underlying Virginia's statute. In *Feeney*, this Court applied the standards set forth in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), for determining whether a facially neutral classification is invidiously discriminatory. 442 U.S. at 273. In *Arlington Heights*, 429 U.S. at 266, the Court made clear that the Equal Protection Clause "demands a *sensitive inquiry* into such circumstantial and direct evidence of intent [to discriminate] as may be available." (Emphasis added); *see also Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Similarly, in *Davis*, 426 U.S. at 242, the Court held that discriminatory intent may be inferred from the "*totality* of the relevant facts..." (emphasis added). The Fourth Circuit violated these fundamental principles of equal protection analysis in holding that "the court is not specifically required to analyze the historical role of stereotypes in legislative classifications." App. 8a.

Throughout this case, petitioner has argued that Virginia's statute reflects the sexist and archaic assumption that women can, and should, rely on their spouses' income and accordingly do not need unemployment compensation to assist them in finding new work or supporting their families. This assumption presupposes, in turn, that women are not important contributors to their households' income -- otherwise, they would not be able to rely exclusively on their spouses' salaries.[4] The devaluing premise, then, is that "the earnings of female wage earners do not contribute sig-

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[4]*See* Note, "Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act," 82 *Mich. L. Rev.* 1925, 1953 (1984) ("[s]tudies have shown that not only are women participating more in the work force, but that these women are either making a significant contribution to family income or are the sole source of it") (footnotes omitted).

nificantly to their families' support." *Weinberger*, 420 U.S. at 645; *see also Wengler v. Druggist Mutual Insurance Co.*, 446 U.S. 142, 148 (1980); *Califano*, 430 U.S. at 206-07. Put another way, Virginia's statutory classification reflects the sort of "'romantic paternalism' which, in practical effect, puts women, not on a pedestal, but in a cage." *Frontiero*, 411 U.S. at 684. Petitioner's argument on this point is supported by substantial evidence of the tendency of unemployment compensation laws to devalue the contributions of working women. Thus, the 1980 National Commission on Unemployment Compensation and several other authorities have criticized the inequities of unemployment insurance programs with respect to working women.[5]

The Fourth Circuit's explicit refusal to consider this legacy of offensive stereotyping is manifest error. As this Court has made clear on numerous occasions, claims involving statutes that overtly discriminate on the basis of gender require an explicit inquiry into whether the law reflects stereotypical assumptions about women. Most recently, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982), the Court stated:

> Although the test for determining the validity of a gender-based classification is straightforward it must be applied free of fixed notions concerning the roles and abilities of males and females. *Care must be taken in ascertaining whether the statutory objective reflects archaic and stereotypic notions.*

Id. (emphasis added); *see also Wengler*, 446 U.S. at 147-49; *Califano*, 430 U.S. at 206-07; *Craig v. Boren*, 429 U.S. 190 (1976);

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[5] *See* United States, National Commission on Unemployment Compensation, *Unemployment Compensation: Final Report* (Wash., D.C.: Government Printing Office, 1980), Vol. 1, at 174-77; United States, National Commission on Unemployment Compensation, *Unemployment Compensation: Studies and Research* (Wash. D.C.: Government Printing Office, 1980), Vol. 3 (M. Dahm, P. Fineshriber, "Disqualifications For Quits to Meet Family Obligations," at 9; M. Dahm, P. Fineshriber, "Women in the Labor Force," at 737); D. Pearce, "Toil and Trouble: Women Workers and Unemployment Compensation," 10 *Journal of Women in Culture and Society* 439 (1985).

Stanton v. Stanton, 421 U.S. 7 (1975); *Weinberger*, 420 U.S. at 643; *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero*, 411 U.S. at 677; *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). In each of these cases, which involved challenges to overt expressions of gender discrimination, the Court conducted a detailed inquiry into stereotypical notions evidencing an intent to discriminate against women.

Contrary to the Fourth Circuit's interpretation of *Feeney*, the rule logically extends to cases, like the present one, involving facially neutral statutes that have a disparate impact on women. Indeed, in *Feeney*, the Court found that:

> nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a *stereotypical and predefined place* in the Massachusetts Civil Service.

442 U.S. at 279 (emphasis added). And, in a footnote, the Court again considered (and rejected) the claim that the veteran's preference statute "is laced with 'old notions' about the proper roles and needs of the sexes." *Id.* at 280 n.27. Significantly, in support of this statement, *Feeney* cited *Califano*, *supra*, and *Weinberger*, *supra*, where this Court conducted searching inquiries into gender stereotyping. *Id.*[6]

The Fourth Circuit's ruling not only misreads *Feeney*, it also fails to withstand independent scrutiny. Certainly, there is no basis in logic or precedent to conclude that an inquiry into stereotypes is any less relevant or important in determining whether a facially neutral statute is covertly gender-based or reflects a discriminatory purpose. Nor were any such reasons advanced by the court below. Moreover, at this stage in the history of equal protection jurisprudence, when statutory discrimination

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[6] *See also Jackson v. Thornburgh*, 907 F.2d 194, 197 (D.C. Cir. 1990) (relying on absence of "archaic and stereotypical notions" of gender in upholding facially neutral prison policy that had a disproportionate impact on women).

is far less often overt, an inquiry into underlying stereotypes is of even *greater* importance in protecting against more subtle forms of discrimination. Simply put, if the Fourth Circuit's view were correct, artful drafting would enable legislatures to avoid intermediate equal protection scrutiny.

Time and again, this Court has invalidated statutes that reflect stereotypical assumptions about the value of women's labor. *Weinberger*, for example, invalidated a statute that granted certain survivors' benefits to widows, but not widowers. In so doing, the Court explicitly rejected the rationale "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." 420 U.S. at 643. *Frontiero* similarly struck down a statute that was based on an assumption that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives." 411 U.S. at 688-89. And, in *Califano*, this Court invalidated a statute under which survivors' benefits were payable to a widow regardless of the degree of her dependency, but to a widower only if he was receiving at least one-half of his support from his wife. 430 U.S. at 199.

Here, too, the extent to which Virginia's statute reflects stereotypical assumptions about the value of women's labor bears directly on its constitutionality. This is not merely an abstract concern in this case. Contrary to the legislature's stereotype, petitioner was the sole wage earner in her family at the time she relocated to be with her husband. The effect of the 1979 amendment, then, has been to deprive her family of *any* source of income. Thus, it is the supreme irony that petitioner's success in breaking out of stereotypical earning patterns has contributed to her family's impoverishment.

In short, Virginia's policy, as applied to petitioner and others like her, perpetuates an unemployment compensation system that devalues the contribution of working women and, as a result, creates the kind of unstable financial prospects that so often lead working women into poverty. Review is warranted because the Fourth Circuit's refusal even to consider the role of stereotyping

is a critical error that will, over time, have a significant adverse impact on thousands of working women and their families.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1, 1992

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BARBARA AUSTIN,
Plaintiff-Appellant,

v.

SANDRA BERRYMAN; PATRICE JOHNSON; JOSEPH HAYES; RALPH G. CANTRELL,
Defendants-Appellees.

No. 91-1750

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
Samuel G. Wilson, District Judge.
(CA-86-147-A)

Argued: December 4, 1991

Decided: January 28, 1992

Before MURNAGHAN and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Sprouse and Senior Judge Butzner joined.

COUNSEL

ARGUED: Hugh Fairley O'Donnell, CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INC., Castlewood, Virginia, for Appellant. Susan Troia Ferguson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond,

Virginia, for Appellees. **ON BRIEF:** Mary Sue Terry, Attorney General, H. Lane Kneedler, Chief Deputy Attorney General, Stephen D. Rosenthal, Deputy Attorney General, Frank Seales, Jr., Chief and Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees.

OPINION

MURNAGHAN, Circuit Judge:

The present case arises from prior litigation before the Fourth Circuit, wherein the plaintiff, Barbara Austin ("Austin"), challenged section 60.2-618(1)(ii) of the Code of Virginia Annotated,[1] which, *inter alia*, excludes from unemployment compensation benefits a spouse who voluntarily leaves employment to relocate with his or her spouse. Austin's challenge to the statute originally involved three theories: (1) that the statute infringed on her First Amendment right to exercise a religious belief; (2) that the statute infringed upon fundamental marital rights protected by the Fourteenth Amendment; and (3) that the statute violated the equal protection clause of the Fourteenth Amendment because of its gender-based classification, in that it has a disparate impact on women, and that the statute was so intended when enacted.

We, sitting *en banc*, ruled that the first two challenges to the statute were without merit. *Austin v. Berryman*, 878 F.2d 786, 788 (4th Cir.), *cert. denied*, 493 U.S. 941 (1989). In so deciding, the court reversed the district court's determination that the statute was unconstitutional. *Id.* However, since the lower court had failed to reach Austin's third challenge to the statute, having already granted complete relief on the other two theories, the previously unaddressed equal protection question found itself still open. The question was heard before a district court, which held that Austin was not entitled to recovery. Thus was born the present appeal.

I.

[1]The statute was formerly codified at Va. Code Ann. § 60.1-58(a)(ii).

The statute at issue is Virginia's Unemployment Compensation Act, Virginia Code § 60.2-618(1)(ii), which provides in pertinent part:

> § 60.2-618. Disqualification for benefits. — An individual shall be disqualified for benefits upon separation from the last employing unit . . . .
>
> (1) . . . if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter the term "good cause" shall *not* include (i) the voluntary leaving of work with an employer to become self-employed, or (ii) the voluntary leaving of work with an employer to accompany or to join his or her spouse to a new locality . . . .

The above-quoted language was added to the Virginia Unemployment Compensation Act in 1979. Austin has challenged § 60.2-618(1)(ii) on an equal protection clause basis, arguing that the statute discriminates against women.

In June of 1985, Austin voluntarily left her employment with McVitty House, Inc. in Salem, Virginia, where she was employed as a laundress. She afforded no notice to her employer when she quit her job to accompany her husband in a move, approximately 150 miles away, to Castlewood, Virginia. Apparently, at the time of the move Austin was the sole wage earner for her family of four children. Subsequent to the move, Austin applied for unemployment benefits. She was disqualified for benefits pursuant to Virginia Code § 60.2-618(1)(ii) because she was determined to have voluntarily left work without good cause. She then filed suit against various officials involved with the administration of Virginia's Employment Commission ("the defendants"). She now appeals the district court's decision to uphold the statute in question and to deny her unemployment benefits.

The appeal involves only a question of law, *i.e.*, whether the district court erred in determining that the Virginia statute at issue was not violative of the equal protection clause of the Fourteenth Amendment. The facts behind the case are undisputed. Therefore, we review

the district court's application of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II.

In a carefully written and comprenensive opinion, the district court denied Austin the relief she sought and entered judgment for the defendants. Austin, on appeal, has contended that the district court committed reversible error in three respects: (1) in failing to consider or address the fact that the persons injured by the Virginia statute are overwhelmingly women; (2) in failing to consider the stereotypical assumptions implicit in the Virginia statute that conditions receipt of unemployment compensation on marital status; and (3) in evaluating the legislative purpose behind the statute. We take, in turn, each of Austin's allegations.

First, Austin has contended that because Virginia Code § 60.2-618 primarily impacts women negatively, the district court erred in failing to find the statute a gender-based classification. Austin places heavy reliance on one of the defendants' answers to an interrogatory that sought information regarding the sex of persons disqualified under the Virginia statute in the last six months of 1989. According to the defendants' response, out of 713 individuals disqualified during the six months' time-frame for leaving employment to accompany a spouse, 86.8% were women. Relying on the contention that the class injured by the statute is overwhelmingly comprised of women, Austin has attempted to distinguish the Supreme Court decision of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), thereby attempting to show an equal protection violation.

The defendants, on the other hand, have maintained that the district court correctly found the Virginia statute free of constitutional infirmity. Defendants have contended that the statute at issue is facially neutral, applying equally to males and females, rationally based and free of invidious discrimination. Moreover, defendants have insisted that Austin's disparate impact argument fails under the approach adopted by the Supreme Court in *Feeney*.

In *Feeney*, a case strikingly similar to the instant case, the Supreme Court rejected an equal protection clause attack on a statutory prefer-

ence system for veterans. *Id.* at 274. Arguing that most veterans are men, the *Feeney* plaintiffs attempted to show gender discrimination based upon a disparate impact argument. In rejecting the plaintiffs' arguments, the Supreme Court set forth the framework to be used when analyzing an equal protection challenge against a facially neutral statute:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statute is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination .... In this second inquiry, impact provides an "important starting point," ... but purposeful discrimination is the "condition that offends the Constitution."

Id. at 274 (citations omitted).

Applying the *Feeney* test to the instant case demonstrates that Austin's challenge to the Virginia statute must fail. First, Virginia Code § 6.2-618 is facially neutral as it simply excludes from unemployment benefits those "spouses" who voluntarily terminate their employment to accompany another spouse on a move. The term "spouse" obviously includes both husbands and wives, men and women.

However, our inquiry does not end there. *Feeney* instructs us next to determine whether the purportedly gender-neutral statute is actually a classification which by design is covertly gender-based. *Id.* Austin has not demonstrated that the classification of "spouse" is, either overtly or covertly, based upon gender. As the district court correctly emphasized, Austin, herself, provided in her brief an "economic justification" for the statute at issue. As Austin pointed out, the impetus of the statute at issue could be largely attributed to public employers of military spouses who participated in Virginia's unemployment system under a method by which they were taxed on a "reimbursable basis," *i.e.*, they were required to repay the Unemployment Compensation Trust Fund an amount equivalent to the full amount of benefits

that were paid out on account of any of their employees. Because of that repayment requirement, employers of military spouses had a direct financial interest in preventing the payment of unemployment benefits to the spouses of military employees who relocated with their spouse pursuant to military orders. Significantly, the language of the statute at issue, as initially proposed, covered only public employees. However, because the Virginia unemployment compensation scheme received money from the federal government, the proposed statutory language was given to the federal government to review. It was the federal government that pointed out that it was impermissible to distinguish between public and private employees, thus resulting in a rewording of the proposed statutory language to cover *all* who voluntarily terminate their employment to accompany a spouse in relocating. Ultimately, the governing statute was enacted with that modification. With such an objective in mind, it is difficult to see any gender-based classification or covert discrimination lurking behind the language.

Moreover, the defendants have enunciated legitimate goals of the classification, namely "to insure a stable work force, to avoid a tax penalty on employers who maintain positions for employees, and to pay benefits to persons who become unemployed through no preference or fault of their own." Considering the legislative history of the Virginia statute, Austin cannot meet the first *Feeney* test because she has failed to show, in the face of a neutral statute, that the classification of "spouses" is gender-based. Accordingly, we then turn to the second element of the *Feeney* test.

The second prong of the *Feeney* test is whether the adverse effect of the statute upon women "reflects invidious gender-based discrimination." 442 U.S. at 274. In considering the second prong of the *Feeney* test, disparate impact can provide an indication of a constitutional violation, "but purposeful discrimination is 'the condition that offends the Constitution.'" *Feeney*, 442 U.S. at 274 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

Austin has attempted to distinguish, on a statistical basis, the clear mandate of the *Feeney* holding that disparate impact alone is insufficient to show a constitutional violation. Austin has argued that in *Feeney* the injured class was only 61.3% women, while in the case

at bar, women comprise 86.8% of the injured class. In the face of such statistics, Austin has contended that the district court should have distinguished *Feeney* and, thus, should have concluded, on the basis of disparate impact, that the spousal classification utilized in the Virginia statute was merely "a pretext for gender discrimination."

Austin has selectively quoted *Feeney* in support of her attempt to distinguish the case. However, it is clear when viewing the *Feeney* case as a whole that Austin's challenge to the Virginia statute cannot succeed in its attempt at demonstrating invidious discrimination based merely upon a disparate impact showing. While it is, perhaps, unfortunate that the statute, in one sense, negatively impacts women who relocate with their husbands, it is obvious that the statute, viewed more broadly, also negatively impacts men who relocate with their wives, as well as both spouses whenever a husband or wife relocates to be with a marital partner (in that the total family income will suffer from the inability of husband or wife to receive the unemployment benefits).

The only real authority that Austin has cited in support of her argument is *Boren v. California Department of Employment Development*, 59 Cal. App. 3d 250 (1976) (holding that the equal protection clause renders unconstitutional a statute that denies unemployment compensation to a person who leaves work because of family reasons or to follow a spouse). However, in the face of the clear United States Supreme Court mandate subsequently handed down in *Feeney*, the California court's opinion loses any persuasive value. Because Austin has failed to satisfy either prong of the *Feeney* test, her first point of error must be rejected.

In her second point of error, Austin has contended that the district court erred in failing "to consider the stereotypical assumptions implicit in the statute." Essentially, Austin's argument is that because "the history of women in the work force reflects a constant struggle to overcome stereotypical biases about the relationship of work to marriage," and because the Virginia statute allegedly "denigrates women's efforts in the workplace," the district court's "failure to address the issue of stereotype constitutes legal error." Austin cites a footnote in the *Feeney* opinion as support for her broad argument. However, *nowhere* in the *Feeney* opinion, and certainly not in the

footnote cited by Austin,[2] does the Court "explicitly recognize that proper equal protection analysis call[s] for a consideration of the role of stereotypes in a legislative classification," a characterization which Austin has attempted to employ. Even if we strain to read the language of the footnote as Austin characterizes it, it simply does not support her argument. While a trial court is to examine a statute to determine whether it is a pretext for gender discrimination, the court is not specifically required to analyze the historical role of stereotypes in legislative classifications. Accordingly, the district court's failure expressly to address stereotypes is not error.

Finally, Austin has insisted that the lower court erred in analyzing and evaluating the legislative intent behind the Virginia statute. Austin argues that she has sufficiently shown invidious discrimination by demonstrating that at least one of the defendants "actively participated in the legislative process with specific knowledge that the law would mainly hurt women workers." Once again, Austin has attempted to distinguish the *Feeney* case. This time, Austin would distinguish *Feeney* in that the statutory preference system favoring veterans had a "lofty gender-neutral goal readily apparent." Unlike the statute at issue in *Feeney*, Austin has maintained that the classification contained in the Virginia statute has no substantial relationship to any important state interest. Essentially, Austin has argued that the legislature of Virginia and the defendants, in enacting Virginia Code § 60.2-618, were motivated, in part, by an intent to discriminate against women.

The defendants have countered Austin's third contention by arguing that at the time the Virginia statute was enacted, Virginia's General Assembly was faced with an Unemployment Trust Fund that was at a dangerously low level. Combined with the legitimate economic rationales for the statute mentioned above, the defendants have insisted that Austin's third attack on the lower court's decision must fail as well.

Initially, Austin's argument that the government must show a substantial relationship to an important state interest is misplaced and embodies an incorrect standard. The test advocated by Austin is

[2]*See Feeney*, 442 U.S. at 280 n.27.

reserved for cases involving a gender-based classification. *Feeney*, 442 U.S. at 272-73. Here, because we have determined that the classification at issue is not gender-based, we apply the rational relationship test. *See Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). As aforementioned, the statute has a legitimate, rational economic purpose.[3]

Finally, turning to Austin's argument that the district court's decision was infirm in its examination of legislative history, it is clear that the court conducted an in-depth analysis of the legislative history behind the enactment of the Virginia statute. In addition, the court largely accepted Austin's own characterization of the competing economic interests at work that provided the impetus for the statute. Considering all of the above, the district court simply concluded that Austin had failed to demonstrate purposeful (invidious) discrimination:

> Even viewing Austin's case in the light most favorable to her position, Austin has failed to show that a gender-based discriminatory purpose in any way shaped the Virginia legislation at issue here. Moreover, even if we were to accept Austin's argument that the defendants knew that the Virginia statute would largely impact women, we are brought nowhere closer to locating constitutional infirmity. For, as the Supreme Court has clearly stated,
>
> > "discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

[3]While it may be that the statute is an unfortunate policy choice, it is for the legislature, not the courts, to determine policy. As the Supreme Court has noted, "the calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Feeney*, 442 U.S. at 272 (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)).

Feeney, 442 U.S. at 279 (citing *United Jewish Organizations v. Carey*, 430 U.S. 144) (other citations omitted). Austin has simply failed to make a showing of discriminatory purpose.

Consequently, we affirm the district court's decision in the case at bar. Virginia Code § 60.2-618 is a facially neutral statute that has a legitimate economic purpose. Moreover, Austin has failed to demonstrate any covert discrimination lurking beneath the surface of the statute. In light of *Feeney*, Austin's disparate impact argument, standing alone, is insufficient to demonstrate purposeful discrimination.

The decision is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

BARBARA AUSTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0147-A
	)	
SANDRA BERRYMAN, et al.,	)	FINAL ORDER
	)	
Defendants.	)	

In accordance with the court's memorandum opinion entered on this date it is ORDERED and ADJUDGED that judgment be entered for defendants, Sandra Berryman, in her official capacity as Acting Chief Appeals Examiner of the Virginia Employment Commission, Patrice Johnson, in her official capacity as Special Examiner of the Virginia Employment Commission, Joseph Hayes, in his official capacity as Special Examiner for Commission Appeals of the Virginia Employment Commission, and Ralph Cantrell, in his official capacity as Commissioner of the Virginia Employment Commission, and against plaintiff, Barbara Austin, and this case is ORDERED stricken from the docket of the court.

ENTER this 31st day of July, 1991.

/s/
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

BARBARA AUSTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0147-A
	)	
SANDRA BERRYMAN, et al.,	)	**MEMORANDUM OPINION**
	)	
	)	
Defendants.	)	

An individual otherwise eligible to receive employment compensation in Virginia is disqualified by Va. Code Ann. § 60.2-618 (Repl. Vol. 1987) if he or she voluntarily resigns "to accompany or to join his or her spouse in a new locality."[1] Plaintiff, Barbara Austin ("Austin"), brings this action pursuant to 42 U.S.C. § 1983 for declaratory, injunctive, and other relief against various officials of the Virginia Employment Commission maintaining that the disqualifying provision is a gender-based classification in violation of the fourteenth amendment to the United States Constitution. That challenge is before the court following en banc reversal by the court of appeals of a declaratory judgment entered by the Honorable Glen M. Williams declaring the statute unconstitutional on first amendment and other grounds. Having granted complete relief, Judge Williams found it unnecessary to decide the question of whether the statute is a gender-based classification in violation of the equal protection clause. That equal protection issue is now before the court.[2] Finding the

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[1] Va. Code Ann. § 60.2-618 recodifies Va. Code Ann. § 60.1-58.

[2] Although not raised by the parties, the mandate from the court of appeals reverses. That mandate does not preclude this court from addressing the previously unaddressed equal protection question. See Heinicke Instruments Co.

statute to withstand equal protection scrutiny, Austin's challenge is rejected.[3]

In 1979, the statute now codified as Va. Code Ann. § 60.2-618 was amended by the Virginia General Assembly to include the challenged provision. As originally introduced by Senator William E. Fears in January 1979, Senate Bill 553 would have disqualified only a person leaving public employment to follow his or her spouse to a new job location. However, both federal and state funds are utilized in the unemployment compensation system, and the payment of federal funds is conditioned on state law, including certain provisions, 42 U.S.C. § 502, and satisfying certain requirements, 26 U.S.C. § 3304. In an effort to determine whether the proposed amendment would meet those requirements, if enacted, on January 19, 1979, John W. Rusher, Associate Commissioner of Unemployment Insurance for the Virginia Employment Commission, submitted Senate Bill 553 to the Associate Regional Administrator for Unemployment Insurance of the United States Department of Labor, T. Edward Burns. Burns responded on January 23, 1979:

> [W]hile we do not recommend passage of any legislation which would automatically deny benefits to an individual who leaves work to accompany a spouse to a new location, such a provision would not conflict with Federal law requirements. However, the amendment contained in S.B. 553 is restricted to individuals in public employment and would therefore appear to contravene the provisions [of] 3304(a)(6)(A) FUTA which requires equal treatment of individuals covered under Section 3309(a)(1).

To cure the problem noted by Burns, the bill was amended by

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v. Republic Corn., 543 F.2d 700, 702 (9th Cir. 1976).

3 Additional facts and procedural history may be found in the district court opinion and the panel and en banc decisions of the court of appeals. Austin v. Berryman, 670 F. Supp. 672 (W.D. Va. 1987), aff'd in part, rev'd in part, and remanded, 862 F.2d 1050 (4th Cir. 1988), rev'd, 878 F.2d 786 (4th Cir. 1989)(en banc).

broadening the disqualifying provision so that anyone leaving work, whether the work was public or private, to follow his or her spouse to a new locality, would be ineligible for unemployment benefits, and the amended bill was enacted on March 31, 1979.

In June of 1985, Austin quit her job in Salem, Virginia, to follow her husband to Castlewood, Virginia. She applied for, but was denied, unemployment compensation based upon Va. Code Ann. § 60.2-618, because she had voluntarily left work to follow her husband to a new locality. Following a hearing, an appeals examiner determined that Austin was not entitled to benefits, and on March 5, 1986, the Commission affirmed the decision of the appeals examiner. This suit was commenced in June of 1986 alleging first amendment and other claims. Those claims were rejected by the court of appeals en banc and are no longer in issue. The only claim currently in issue is the claim that Va. Code Ann. § 60.2-618 violates the equal protection clause because of its impact on women and because of the legislature's discriminatory intent.[4]

Austin maintains that Senator Fears, a senator in the Tidewater area, an area heavily populated by military personnel, introduced Senate Bill 553 in response to pressure from constitu-

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[4] The court has broadly construed Austin's complaint to allege purposeful gender-based discrimination. Austin's "fourth claim for relief" contains the pertinent allegations:

> 31. On information and belief, the vast majority of claimants affected by the statutory provision at issue in this case are women.
>
> 32. On information and belief at the time the statute at issue here was enacted officials of the Virginia Employment Commission knew or had reason to know that the statute would have a disparate impact on female wage earners.
>
> 33. Notwithstanding awareness of the discriminatory impact on women, officials of the VEC lobbied for its enactment.
>
> 34. Because of the discriminatory intent involved in the enactment of the statute and its disproportionate impact on women, Plaintiff's rights to equal protection of the law have been violated by the statute.

ents who were financially impacted by the unemployment compensation system, because they employed the spouses of military personnel who are routinely transferred. Austin then offers her explanation of the financially motivated political pressures that led to the introduction of Senate Bill 553:

> In its original form, the bill proposed by Senator Fears did not propose a general disqualification for all persons who left employment to join or accompany their spouse in a new locality. Rather, his original proposal was limited to persons who left public employment.
>
> To understand why some public employers would be especially interested in spousal leaving provisions, one must understand a basic distinction which exists in the Virginia unemployment compensation law.
>
> Most private sector employers are required to pay taxes on a regular basis to the Unemployment Compensation Trust Fund. The amount of taxes will depend on the employer's experience rating. As a general rule, an increase in the benefits paid out and charged to the employer's individual account will cause an increase in the tax rate.
>
> Under the statutory predecessor to Va. Code §60.2- 528, benefits paid to persons who left work to stay with a spouse were treated the same as benefits currently paid to persons who leave work to take a better job. Although benefits were paid, they were not charged to the account of the individual employer.
>
> Public employers are not automatically required to pay taxes under Virginia law. Under Va. Code §60.2-507 and its statutory predecessors, they have been given the right to choose. They can either pay taxes as other employers do or they can participate in the unemployment compensation program on a reimbursable basis. If they elect the latter course, they must

> repay the Fund an amount "equivalent to the full amount of regular and extended benefits paid." See Va. Code §60.2-507.
>
> Because of the repayment requirement, public employers of military spouses who participated on a reimbursable basis would therefore have had a direct financial interest in preventing payment of benefits.

Memorandum in Support of Plaintiff's Motion for Summary Judgment at 18. In light of the economic justification for and the history of Senate Bill 553, and in light of the fact that most military spouses are female, it follows, according to Austin, that the Virginia General Assembly is chargeable with invidious, gender-based discrimination.

I.

Because "[t]he calculus of effects, the manner in which a particular law reverberates in society, is a legislative and not a judicial responsibility," and because Austin's own arguments demonstrate that Va. Code Ann. § 60.2-618, which is neutral on its face, had a legitimate, non-discriminatory purpose, Austin's equal protection challenge fails.[5] As the United States Supreme Court has made clear, "purposeful discrimination is 'the condition that offends the constitution.'" Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979); see Frock v. United States R.R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); Givens v. United States R.R. Retirement Bd., 720 F.2d 196 (D.C. Cir. 1983), cert. denied, 469 U.S. 870 (1984); Steiger v. United States R.R. Retirement Bd., 761 F.2d 1428 (9th Cir. 1985). Personnel Administrator of Massachusetts v. Feeney is instruc-

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[5] Similar provisions in other states have survived equal protection scrutiny. See, e.g., Warren v. Board. of Review, 463 So.2d 1076 (Miss., 1985); Chandler v. Dep't of Employment Sec., 678 P.2d 315 (Utah, 1984); Pyeatt v. Idaho State Univ., 98 Idaho 424, 565 P.2d 1381 (1977); Gilman v. Unemployment Compensation Bd. of Review, 28 Pa. Commw. 630, 369 A.2d 895 (1977); Kantor v. Honeywell, Inc., 286 Minn. 29, 175 N.W.2d 188 (1970); Illinois Bell Tel. Co. v. Board of Review, 413 Ill. 37, 107 N.E.2d 832 (1952).

tive.

Feeney presented an equal protection challenge by a non-veteran female to the Massachusetts Veteran's Preference Law, which required that all veterans applying for civil service be considered for appointments before all qualifying non-veterans. At the time it was challenged by Feeney, the statute benefitted "an overwhelmingly male class." Feeney, 442 U.S. at 269. In sustaining the statute's validity, the court noted that although the court's recent cases had recognized that the disparate impact of a neutral law on an historically disadvantaged class may indicate that "an unconstitutional purpose may still be at work," those recent cases "signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." Id. at 273. The court then articulated the following test:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a two fold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution."

Id. at 274 (citations omitted). According to the court, to establish a "discriminatory purpose," more is required than "volition" or "awareness of consequences." The decision-maker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279. Because Feeney failed to demonstrate that the law reflected "a purpose to discriminate on the basis of sex," her claim was rejected. Id. at 281. For the same reason, Austin's claim must be rejected.

Although legislation neutral on its face may, in fact, be a purposeful device to discriminate when either race or gender-

based discrimination is claimed, intent nevertheless must be determined. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). But it should be kept in mind that the process of divining legislative intent in an effort to determine whether legislation, neutral on its face, constitutes purposeful discrimination, with the give and take characteristic of the legislative process, often places the judiciary in a position precariously close to interference in that process. See generally South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989), cert. denied, 110 S. Ct. 1129 (1990)."[6] Legislation results from complex and frequently conflicting motivations and intentions. To assume that the judiciary is capable of divining a monolithic intent from such complexity in more than a handful of cases is nothing less than legal fiction. Although we must endeavor to expose purposeful legislative discrimination, whether clear or subtle, we must guard against legal fictions guiding constitutional inquiry when the motivations of a state legislature or Congress are in question. We must not intrude upon legislative decisionmaking through the use of a legal fiction, which in reality masks our own personal preferences. Fortunately, in this case, it is unnecessary for the court to declare a fictional legislative "will" or motive. The purpose of Senate Bill 553 has been explained by Austin. Rather than demonstrating a purpose to discriminate, Austin's own explanation underscores that taxes and other financial concerns--not gender--generated the political pressures leading to the introduction of Senate Bill 553. Thus, like Feeney, Austin has simply failed to demonstrate that the provision she challenges reflects a purpose to discriminate on the basis of sex.

II.

For the reasons stated above, the challenged provision of Va.

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[6] As pointed out by the court of appeals, however, two of the "limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided . . . include race and sex discrimination cases . . . ." Campbell, 883 F.2d at 1259.

Code Ann. § 60.2-618, which disqualifies an individual otherwise eligible to receive unemployment compensation if he or she voluntarily resigns "to accompany or to join his or her spouse in a new locality," is found not to be a gender-based classification in violation of the equal protection clause of the fourteenth amendment. Austin's request for declaratory, injunctive, and other relief, accordingly, will be denied.

An appropriate order will issue.

ENTER this 31st day of July, 1991.

/s/
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 19, 1992

No. 91-1750
CA-86-147-A

BARBARA AUSTIN

Plaintiff - Appellant

v.

SANDRA BERRYMAN; PATRICE JOHNSON;
JOSEPH HAYES; RALPH G. CANTRELL

Defendants - Appellees

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Sprouse and Judge Butzner.

For the Court,

JOHN M. GREACEN

CLERK